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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

WILLIAM J. CLINTON,
PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS

v.

JAMES T. GOLDSMITH, RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

In Section 563 of the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, Tit. V, § 563(a)(1)(A) and (b)(1), 110 Stat. 325, Congress authorized the President to drop from the rolls of the armed forces, and thereby terminate the military status and pay of, any commissioned officer who has been sentenced to confinement for more than six months by court-martial, after the officer's conviction has become final and the officer has served in confinement for a period of six months. 10 U.S.C. §§ 1161(b)(2), 1167. The questions presented are:

1. Whether the Court of Appeals for the Armed Forces has jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a), to bar the President from exercising his authority to drop a commissioned officer from the rolls under 10 U.S.C. §§ 1161(b)(2) and 1167.

2. Whether the President's exercise of authority under 10 U.S.C. §§ 1161(b)(2) and 1167 in this case would violate the Double Jeopardy Clause of the Fifth Amendment or the *Ex Post Facto* Clause, U.S. Const. Article I, Section 9, Clause 3.

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces, reported at 48 M.J. 84 (1998), is located at Pet. App. 1a-19a. The order of the United States Air Force Court of Criminal Appeals is unreported. It is located at Pet. App. 22a-24a. A prior opinion of the Air Force Court of Criminal Appeals affirming respondent's court-martial conviction and sentence is unreported and is located at Pet. App. 30a-38a.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Armed Forces was entered on April 29, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reproduced at Pet. App. 39a-42a.

STATEMENT OF THE CASE

Petitioners' Statement of the Case is accepted except where noted.

Respondent was convicted of various offenses based on two sexual relationships, one occurring in 1989 and the other in 1993. At his court-martial, respondent faced a maximum punishment of a dismissal, confinement for 10 years, forfeiture of all pay and allowances, and a fine. A dismissal would cause automatic forfeiture of Veterans Affairs (hereinafter VA) benefits, such as medical care for his terminal HIV affliction. After considering the evidence and respondent's situation, the court-martial sentenced respondent on March 4, 1994 to six years confinement and to forfeit $2,500 pay per month for 72 months. No dismissal was adjudged. Respondent began serving his sentence to confinement on March 4, 1994. On November 20, 1995, the Air Force Court of Criminal Appeals affirmed the conviction. Throughout his confinement, respondent received the difference between his full pay and the adjudged forfeitures, in accordance with his court-martial sentence.

On February 10, 1996, Congress enacted 10 U.S.C. §§ 1161(b)(2) and 1167, thereby creating a new means for the

President to drop an officer from the rolls (hereinafter DFR) of the Armed Forces, namely when an officer is sentenced by a court-martial to confinement for more than six months, with the sentence having become final and the member having served at least six months confinement.

On September 10, 1996, respondent was notified that he was considered but not selected for promotion to the grade of lieutenant colonel. J.A. 1. He was also notified that he had been selected by the Major Selective Continuation Board to remain on active duty until he first became eligible to retire as an officer at 20 years of service. The Air Force informed respondent that he could accept or decline this continued active service option. If respondent declined continuation on active duty, he would receive an honorable discharge with separation pay, in addition to further benefits, such as transition assistance. Air Force Instruction (hereinafter AFI) 36-3207, paragraph 3.4. and A.2.1.1. On or about September 26, 1996, respondent elected to accept continuation on active duty, thus incurring a one-year active duty service commitment from the date the continuation period began. J.A. 4.

Despite being continued on active duty, the respondent was notified by the Air Force on December 18, 1996, that it was initiating a DFR action pursuant to Section 563 of the National Defense Authorization Act for Fiscal Year 1996 and AFI 36-3207, paragraph 4.2.3. Pet. App. 25a-27a. The notification letter unequivocally states the DFR action would cost respondent his pay, his military status, and his VA benefits. *Id.*

On October 10, 1997, respondent was released from the Disciplinary Barracks at Fort Leavenworth, Kansas, following the completion of his sentence to confinement. He is currently performing military duties for the 37th Civil Engineering Squadron at Lackland Air Force Base, Texas.

SUMMARY OF ARGUMENT

The court-martial sentence imposed on respondent on March 4, 1994 did not include such authorized punishments as a dismissal—a separation with ignominy, nor total forfeitures of pay and allowances, with the resultant loss of Veterans Affairs (VA) Department benefits, including future VA medical care for his HIV infection. A statute that went into effect over two years later (and between 3 to 7 years after the commission of his offenses) sought to remove certain military prisoners as a direct sanction for their court-martial convictions by use of a DFR action. The DFR action imposed severe punishments akin to those respondent avoided in his general court-martial. VA regulations stigmatize prisoners who are released under a DFR action in the same manner (separated under dishonorable conditions) as officers receiving a dismissal as part of the adjudged sentence at a general court-martial. 38 C.F.R. §§ 3.12(c)(2), (d)(3), (k)(3).[1]

The retroactive punishment imposed by the DFR action violated the *Ex Post Facto* and Double Jeopardy Clauses of the Constitution of the United States. Using its expertise in military matters, the Court of Appeals for the Armed Forces properly exercised jurisdiction under the All Writs Act to bar the retroactive, multiple punishment and to insure that only the adjudged and affirmed original sentence was carried out.

ARGUMENT

I. THE COURT OF APPEALS FOR THE ARMED FORCES HAD JURISDICTION UNDER THE ALL WRITS ACT TO BAR THE MILTARY FROM DROPPING RESPONDENT FROM THE ROLLS OF THE AIR FORCE.

[1] The reference to DFR actions in subparagraph (3) of 38 C.F.R. § 3.12(k) applies only to enlisted personnel.

Congress overhauled the military justice system by enacting the Uniform Code of Military Justice (hereinafter UCMJ) in 1950. The UCMJ created a civilian appellate court, now called the U.S. Court of Appeals for the Armed Forces (hereinafter court of appeals, or CAAF). The UCMJ also created intermediate military appellate courts, now called service Courts of Criminal Appeals.

Military appellate courts review court-martial convictions if the approved sentence satisfies the jurisdictional requirements in the UCMJ or if the service Judge Advocate General requests review. Under Article 66, UCMJ, 10 U.S.C. § 866, the Air Force Court of Criminal Appeals (hereinafter AFCCA) exercised direct review jurisdiction over respondent's court-martial because his sentence exceeded one year of confinement. Under Article 67, UCMJ, 10 U.S.C. § 867, the court of appeals had potential jurisdiction over this case once the Air Force Court issued its opinion.[2] The court of appeals did not review respondent's case because neither he nor The Judge Advocate General sought direct review of the decision of the Air Force court below.

The All Writs Act permits federal courts, including military appellate courts, to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). In the mid-1960s, the predecessor Court of Military Appeals held it could collaterally review military justice actions under the All Writs Act, 28 U.S.C. § 1651(a). *United States v. Frischholz,* 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966); *Gale v. United States,* 17 U.S.C.M.A. 40, 37

[2] The service Judge Advocate General could order the case sent to the court of appeals or respondent could petition for review under Articles 67(a)(2) and (a)(3), respectively.

C.M.R. 304 (1967); *United States v. Bevilacqua,* 18 U.S.C.M.A. 10, 39 C.M.R. 10 (1968). This Honorable Court agreed the predecessor court had jurisdiction under the All Writs Act. *Noyd v. Bond,* 395 U.S. 683, 695 n. 7 (1969). The court of appeals also advised the service Courts of Military Review, as they were then known, that they too possessed jurisdiction under the All Writs Act. *United States v. Dettinger,* 7 M.J. 216, 220 (C.M.A. 1979).

A. Several well-acknowledged bases exist to support CAAF's exercise of jurisdiction under the All Writs Act.

As applicable here, the military appellate courts generally have articulated several doctrinal reasons for application of the All Writs Act.

First, the military appellate courts applied the All Writs Act to cases involving their UCMJ statutory jurisdiction. *United States v. Frischholz,* 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966)(Court of Military Appeals has jurisdiction to consider writ of error *coram nobis* after completion of appellate review of sentence that qualified for Article 67 review). This is traditional All Writs Act jurisdiction found in the federal judicial system.

Second, military appellate courts have applied the All Writs Act to cases involving the administration or supervision of military justice within their potential jurisdiction when the court-martial proceedings would violate the accused's rights under the Constitution or the UCMJ. *See e.g. U.S. Navy-Marine Corps Court of Military Review v. Carlucci,* 26 M.J. 328 (C.M.A. 1988); *Unger v. Ziemniak,* 27 M.J. 349 (C.M.A. 1989); *Murray v. Haldeman,* 16 M.J. 74 (C.M.A. 1983); *McPhail v. United States,* 1 M.J. 457 (C.M.A. 1976). *Also compare San Antonio Express-News v. Morrow,* 44 M.J. 706 (A.F. Ct. Crim. App. 1996) *with ABC, Inc. v. Powell,* 47 M.J. 363 (1997)(press seeks writ). This view comports with All

Writs Act practice in the federal judicial system. This Honorable Court has held that federal courts have jurisdiction under the All Writs Act when in aid of their potential jurisdiction. *Roche v. Evaporated Milk Ass'n,* 319 U.S. 21, 25 (1943)(Court of Appeals jurisdiction is not confined to issuance of writs in aid of jurisdiction already acquired but extends to those areas which are within its jurisdiction although no appeal has been perfected); *Ex Parte Peru,* 318 U.S. 578 (1943). Courts also have jurisdiction under the All Writs Act over supervisory matters. *La Buy v. Howes Leather Co.,* 352 U.S. 249 (1957). This Honorable Court extended supervisory review to criminal cases. *Will v. United States,* 389 U.S. 90 (1967).

As pointed out in *In Re Von Bulow,* 828 F.2d 94 (2d Cir. 1987), use of the All Writs Act may be particularly important in cases involving, as in *Goldsmith,* significant novel questions of the first impression, *Id.* at 97, or resolution of important, undecided issues that will forestall future error in the trial courts, eliminate uncertainty, and add importantly to the efficient administration of justice. *Id.* at 98. This principle is significant in the military environment. The UCMJ is designed to promote military efficiency across the globe, and it must operate effectively in a war. *Curry v. Secretary of Army,* 595 F.2d 873, 877 (D.C. Cir. 1978). Extraordinary relief through the All Writs Act can quickly confirm the law for the benefit of all military members to promote good order and discipline in the armed forces, particularly on critical morale and discipline issues. Thus, service members learned that they could not use personal moral scruples to refuse orders related to an unpopular war, as was the case for Captains Noyd (*Noyd, supra*) and Levy (*Parker v. Levy,* 417 U.S. 733 (1974)); that they could not refuse orders to submit to urinalysis drug testing, as was the case for Lieutenant Unger (*Unger, supra*); that they could not

evade a court-martial for off-base drug offenses, as was the case for Boatsmain's Mate Murray (*Murray, supra*); or that the armed forces could not ignore Supreme Court rulings on the lack of court-martial jurisdiction over off-base offenses, as was the case for Sergeant McPhail (*McPhail, supra*). Indeed, in his *amicus* brief in *Carlucci,* 26 M.J. at 333-34, The Judge Advocate General of the Air Force acknowledged that a quick decision under All Writs Act jurisdiction promotes good order and discipline by providing guidance on pending cases.

In deciding if a military appellate court may invoke jurisdiction under the All Writs Act, it is appropriate to observe the line of cases in the federal judicial system permitting interlocutory appeals before final judgments in criminal cases. This Honorable Court has permitted a criminal defendant to bypass the final judgment rule with an interlocutory appeal when the defendant asserted a right which would effectively be destroyed if not vindicated at trial. *United States v. MacDonald,* 435 U.S. 850, 860 (1978) (interlocutory appeal on speedy trial claim denied). Thus, the Supreme Court permitted an interlocutory appeal for a colorable claim of double jeopardy. *Abney v. United States,* 431 U.S. 651 (1977). Military courts lack interlocutory appeal procedures for an accused to resolve a colorable claim of double jeopardy and *ex post facto* violations. However, as in *Goldsmith,* it can invoke jurisdiction under the All Writs Act to accomplish the same goal and still be in aid to its potential jurisdiction.

Recent *ex post facto* cases have come to the Supreme Court via habeas corpus, typically under 28 U.S.C. § 2241. *Lynce v. Mathis,* 519 U.S. 433 (1997); *Collins v. Youngblood,* 497 U.S. 37 (1990). This habeas corpus statute does not apply to the military appellate courts. These courts, however, can use the All Writs Act in exercise of their jurisdiction to achieve a similar result. Invoking the All Writs Act enables a

service member to litigate a legal and practical right that would otherwise be destroyed, consistent with the holdings in *Abney* and *MacDonald. See e.g. McCray v. Grande,* 38 M.J. 657 (A.C.M.R. 1993)(habeas corpus sets free a prisoner held past his release date).

This Honorable Court has recognized a federal court's supervisory authority. Although not an All Writs Act case, *United States v. Hasting,* 461 U.S. 499, 505 (1983) held that federal courts may use supervisory powers to implement a remedy for violation of recognized rights, to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury, and to design remedies to deter illegal conduct. Congress granted broad discretion to CAAF to achieve the ends of justice by overseeing the administration of justice in the United States Armed Forces. *Gale v. United States,* 17 U.S.C.M.A. 40, 37 C.M.R. 304, 306 (1967). In *Gale,* the then Court of Military Appeals focused on Congressional intent to provide the Court of Military Appeals with general supervisory authority over the administration of military justice when 10 U.S.C. § 867 was enacted. *Id.* The importance of providing civilian review of military justice matters was emphasized by Representative Philbin, a member of the Committee on Armed Services, on the House floor when he stated:

> This court will be completely detached from the military in every way. It is entirely disconnected with [sic] the Department of Defense or any other military branch, completely removed from outside influences. It can operate, therefore, as I think every Member of Congress intends it should, as a great, effective, impartial body sitting at the topmost rank of the structure of military justice and insuring as near as it can be insured by any human agency, absolutely fair and unbiased consideration for every accused. 95 Cong. Rec. 5726 (1949).

INTENTIONAL
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The key role envisioned by Congress in enhancing the fairness of military justice was stressed by the Hon. Overton Brooks during the full committee hearings on H. R. 4080. Rep. Brooks stated that

> [t]he Court of Military Appeals, which finally decides questions of law, is the court of last resort for each of the armed forces and also acts with the Judge Advocates General of the three Departments as an advisory body with a view to securing uniformity in policy and in sentences and in discovering and remedying defects in the system and its administration.

Full Committee Hearings on H. R. 3341 and H. R. 4080, 81st Cong., 1st Sess. 1328 (1949).

In 1968, Congress amended Article 67(a)(1) to clarify the status of the Court of Military Appeals, stating "[t]here is a United States Court of Military Appeals established under article I of the Constitution of the United States and located for administrative purposes only in the Department of Defense." Act of June 15, 1968, Pub. L. 90-340, 82 Stat. 178. The House Committee on Armed Services noted:

> One of the purposes of this bill is to make it abundantly clear in the law that the Court of Military Appeals is a court, although it is a court under article I of the Constitution. There has been some claim that the court, having been put under the Department of Defense for administrative purposes, is in effect an administrative agency. If it had such status, it would not be able to question any of the provisions of the Manual for Courts-Martial since the manual had been promulgated by Presidential order. The bill makes it clear that the Court of Military Appeals is a court and does have the power to question any provision of the manual or any executive regulation or action as freely as though it were a court constituted under article III of the Constitution. H. Rep. No. 1480, 90th Cong., 2d Sess. 2 (1968).

Third, the military courts have applied the All Writs Act to issue orders to commanders as might be necessary or appropriate to protect and effectuate or to prevent the frustration of orders and mandates it has previously issued in exercise of their jurisdiction. *United States v. Montesinos,* 28 M.J. 38 (C.M.A. 1989); *United States v. Bullington,* 13 M.J. 184 (C.M.A. 1982); *United States v. Mahoney,* 36 M.J. 679 (A.F.C.M.R. 1992)(Commander defied military judge's order). This practice comports with practice in the federal judicial system. *United States v. New York Telephone Co.,* 434 U.S. 159, 172 (1977)(District court had authority under Fed. R. Crim. P. 41 to authorize installation of pen registers and authority under All Writs Act to enforce the order against third party); *Adams v. United States ex rel. McCann,* 317 U.S. 269, 273 (1942)(Federal Court can avail itself of all writs in the performance of its duties, when the use of such historical aids is calculated in its sound judgment to achieve the ends of justice). *See also Young v. United States ex rel. Vuitton et Fils S.A.,* 481 U.S. 787 (1987)(The exercise of supervisory authority is especially appropriate in the determination of the procedures to be employed by courts to enforce orders, a subject that directly concerns the functioning of the judiciary).

B. CAAF properly exercised jurisdiction by invoking its supervisory power and its duty to protect and effectuate the affirmed sentence.

CAAF had jurisdiction under the All Writs Act to consider respondent's colorable claims of violations of the *Ex Post Facto* and Double Jeopardy Clauses. The court of appeals premised its All Writs Act jurisdiction on its

supervisory power over the administration of military justice for cases within its potential jurisdiction. Pet. App. 5a. The Air Force Court of Criminal Appeals had already exercised jurisdiction over the case and affirmed respondent's sentence in an unpublished opinion. Respondent could have petitioned for discretionary review of his conviction under Article 67(a)(3) after the AFCCA opinion. Thus, CAAF had potential jurisdiction over respondent's court-martial.

In Part I of its opinion, CAAF noted that it had a limited duty to insure that respondent was not subject to cruel and unusual punishment under Article 55, UCMJ, 10 U.S.C. § 855, by being deprived of medication to combat his infection of the human immunodeficiency virus.[3] Pet. App. 7a. CAAF's opinion in *Goldsmith* is less explicit on its jurisdictional basis under the All Writs Act to review the proposed DFR action.

In Part II of its opinion, CAAF was concerned with *Ex Post Facto* and Double Jeopardy Clause considerations of the DFR action in its relationship to the adjudged and affirmed sentence of the respondent. CAAF had jurisdiction under the All Writs Act to consider the DFR action, as double jeopardy and *ex post facto* concerns are the type of concerns that warrant interlocutory appeal or extraordinary relief under *Abney, Lynce v. Mathis,* and *Collins v. Youngblood.* The Goldsmith case carried significant implications on presidential authority to undertake a DFR action as applied to respondent. A declaration that CAAF lacks jurisdiction over respondent's DFR challenge would grant license to the United States to violate the *Ex Post Facto* and Double Jeopardy Clauses of the U.S. Constitution, unfettered by judicial review in the very court that reviews courts-martial proceedings. Additionally, its

[3] The All Writs Act extends jurisdiction to review post-appeal illegal conditions of confinement. *Moore v. Akins,* 30 M.J. 249, 253 (C.M.A. 1990).

impact on morale and discipline also was important to justify supervisory authority in the case, just as in *Noyd, Levy, Unger,* and *McPhail.* Finally, respondent's circumstances were urgent. He was terminally afflicted with the HIV virus. He lacked time to litigate elsewhere. Respondent had colorable double jeopardy and *ex post facto* claims to warrant CAAF jurisdiction.

CAAF could have also exercised All Writs Act jurisdiction to protect and to effectuate the adjudged and affirmed findings and sentence. Article 76, UCMJ, 10 U.S.C. § 876, holds that "[o]rders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers", subject to remission or suspension by the service Secretary or the authority of the President. CAAF thus had a statutory interest under Article 76 to insure that the adjudged and affirmed findings and sentence were not contravened by the DFR action, which would have increased the punishment imposed upon respondent, in violation of the *Ex Post Facto* and Double Jeopardy Clauses. Although the court had such All Writs Act jurisdiction under *Montesinos* and *Bullington,* the court did not mention this basis of jurisdiction. Respondent's writ petition did, however. Resp. C.A. Writ Pet. 10. Even though CAAF did not rest its decision on this jurisdictional basis, this Honorable Court can consider this jurisdictional basis in upholding the CAAF decision. *Blum v. Bacon,* 457 U.S. 132, 137 n. 5 (1982).

C. CAAF properly took jurisdiction, as respondent was not required to originally file his DFR claim with the Air Force Court.

Petitioners assert that CAAF lacked jurisdiction because respondent did not perfect an appeal to that court. The assertion is meritless. *FTC v. Dean Foods Co.,* 384 U.S. 597, 603 (1966). Indeed, this Honorable Court has held that a

defendant could use the All Writs Act to seek a writ of *coram nobis* after the defendant's sentence was complete and he was no longer in custody. *United States v. Morgan,* 346 U.S. 502, 511 (1954)(Continuation of litigation after final judgment and exhaustion or waiver of statutory right is permitted through extraordinary writ when circumstances compel such action to achieve justice). The court-martialed officer in *Frischholz* also sought extraordinary relief under the All Writs Act years after his conviction and appeal. *Accord Garrett v. Lowe,* 39 M.J. 293 (C.M.A. 1994)(Writ granted six years after final appeal).

Petitioners assert that respondent first should have sought extraordinary relief from the DFR action at the Air Force Court of Criminal Appeals. CAAF rejected this assertion for two reasons. First, CAAF agreed to original submission of the DFR action. In *Gray v. Mahoney,* 39 M.J. 299, 303 (C.M.A. 1994), CAAF held a petition for extraordinary relief did not have to be filed in a service court of military review as a prerequisite for the consideration of the case. Subsequent to the *Gray v. Mahoney* decision, CAAF clarified their rules by promulgating Court of Appeals for the Armed Forces Rule 4(b), 43 M.J. CLXXVII (November 1995). This rule provides that a petition for extraordinary relief should *ordinarily* be filed with the service court of criminal appeals. Rule 4(b) explicitly permitted initial filing with CAAF for *good cause. See e.g. ABC, Inc. v. Powell,* 47 M.J. 363 (1997). Since CAAF agreed there was good cause to accept the original filing of the DFR action, Pet. App. 9a, respondent was not required to originally file the DFR action with AFCCA.

Second, CAAF said, respondent could "piggyback" his DFR writ petition on his HIV medication writ appeal under the concept of pendent jurisdiction. Pet. App. 9a. Because the court agreed to original submission, this Honorable Court need not decide how supplemental jurisdiction in 28 U.S.C.

§ 1367 applies to military justice practice, if at all. Prior to enactment of § 1367, pendent jurisdiction involved mating state claims with a related federal claim in a civil action. Also, ancillary jurisdiction involved claims brought by other parties than the plaintiff in a civil action. To overrule *Finley v. United States,* 490 U.S. 545 (1989), Congress enacted 28 U.S.C. § 1367 as part of the Judicial Improvements Act of 1990 to create supplemental jurisdiction. D. Siegel, *Practice Commentary,* 28 U.S.C.A. § 1367 note (1993). Simply put, Section 1367 and concepts of pendent jurisdiction do not apply to military appellate courts. Even so, CAAF still had authority to hear respondent's original DFR claim as good cause existed to file the petition with the higher appellate court.

D. Respondent was not required to exhaust administrative remedies before bringing a writ petition to CAAF.

Petitioners incorrectly assert that respondent had to exhaust other remedies before bringing his petition for extraordinary relief. Pet. Br. 19-20.

Respondent had completed his appeals and was terminally afflicted with the HIV virus. He had limited time to live and to litigate. Where litigation at a different tribunal would prove futile, this Honorable Court has declined to invoke the exhaustion doctrine to bar review. *Lynce v. Mathis,* 519 U.S. 433, 436 n. 4 (1997)(though petitioner did not institute *Ex Post Facto* challenge in state court, this Honorable Court reviewed the case on its merits as it deemed exhaustion of state remedies futile). The law is not deaf when an emergency such as respondent's speaks.

It would have been futile to petition the Air Force Board for Correction of Military Records (hereinafter BCMR). First, BCMRs lack the ability to declare a federal statute

unconstitutional. Second, 10 U.S.C. § 1552 prohibits BCMR consideration of records of courts-martial and related administrative records with two inapplicable exceptions. Lastly, as respondent pointed out in his writ petition to CAAF, Congress has expressed considerable concern about the perception that the BCMRs are "unresponsive, bureaucratic extensions of the uniformed services." H. Conf. Rep. No. 450, 104th Cong., 1st Sess. 798 (1996), *reported in 1996 U.S. Code Cong. & Admin. News 324*. In the same law that created the new DFR statute, Congress also ordered the Secretary of Defense to report on his proposals to fix the BCMRs.[4] National Defense Authorization Act for Fiscal Year 1996, Pub. L. 104-106, § 554, 110 Stat. 320. Thus, CAAF properly agreed to hear the case.

E. CAAF's invocation of jurisdiction under the All Writs Act is properly confined to reviewable issues.

Petitioners and the dissent in *Goldsmith* suggest military courts will use the All Writs Act to rule on security clearances, promotions, and administrative discharges. Pet. for Cert. 12; Pet. App. 19a. The suggestion lacks merit. Precedent already precludes judicial review of the denial of a security clearance. *Department of Navy v. Egan,* 484 U.S. 518 (1988); *Webster v. Doe,* 486 U.S. 592 (1988); *Cafeteria & Restaurant Workers Union v. McElroy,* 367 U.S. 886 (1961). Military courts do not review personnel decisions, *Wean v. Holder,* 47 M.J. 540 (Army Ct. Crim. App. 1997), or administrative discharges. *In*

[4] Three years later in late 1998, Congress is still trying to fix the BCMRs. The recently enacted Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. 105-261, §§ 541-45, 112 Stat. 2019-2022, mandated sweeping changes to the BCMR. BCMRs lack an attorney. *Glines v. Wade,* 586 F.2d 675, 678 (9th Cir. 1978). Now Congress has mandated that each BCMR have both a full time lawyer and physician. BCMRs may not reduce their staffs, and they must meet designated processing standards over a 10-year period.

Re Clifton, 28 M.J. 614 (A.F.C.M.R. 1989). The military courts do not review summary courts-martial, *Thomas v. United States,* 19 U.S.C.M.A. 639 (1970), or Article 15 nonjudicial punishments, *Whalen v. Stokes,* 19 U.S.C.M.A. 636 (1970). Petitioners suggest *Fletcher v. Covington,* 42 M.J. 215, *dismissed,* 42 M.J. 116 (1995) says otherwise. Pet. for Cert. 10. Petitioners' brief failed to mention that the case was ultimately dismissed. There, court-martial charges were referred against a Chief Petty Officer after his urine tested positive for drugs. The Chief sought discovery of a damaging quality control report on the laboratory that tested his urine. To avoid producing a report that could hurt other cases, the government dismissed the court-martial, and the ship's captain imposed Article 15 punishment for the same offense. Since the Chief was aboard ship, he had no right to demand a court-martial or to discover the report. The issue dealt with dismissing court-martial charges to preclude discovery, not mere review of an Article 15. The Chief withdrew his petition. *Id.* at 116.

In conclusion, AFCCA had actual jurisdiction over respondent's case under Article 66, UCMJ, and CAAF had potential jurisdiction under Article 67, UCMJ, because of the approved sentence respondent received at his general court-martial. When General Griffith initiated a DFR action that would impose punishments akin to those respondent avoided in his court-martial, CAAF had authority under the All Writs Act in its supervisory capacity to protect and effectuate the adjudged and affirmed sentence by precluding additional punishment that violated the *Ex Post Facto* and Double Jeopardy Clauses of the U.S. Constitution. Respondent's plight was an emergency and possible administrative remedies would have been ineffective. CAAF rightfully agreed to exercise its jurisdiction to hear respondent's writ petition.

II. THE PRESIDENT'S EXERCISE OF AUTHORITY UNDER 10 U.S.C. §§ 1161(b)(2) AND 1167 IN THIS CASE WOULD VIOLATE THE DOUBLE JEOPARDY AND *EX POST FACTO* CLAUSES OF THE CONSTITUTION.

The U.S. Constitution prohibits *ex post facto* laws. U.S. Const. Art. I, § 9, cl. 3. As applied here, a statute that violates this clause has three requirements:

(1) A penal statute.

(2) Applied retroactively.

(3) Disadvantaging the offender affected by it by increasing the punishment for the crime.

Lynce v. Mathis, 519 U.S. 433 (1997); *Collins v. Youngblood,* 497 U.S. 37 (1990); *Beazell v. Ohio,* 269 U.S. 167 (1925); *Calder v. Bull,* 3 U.S. (3 Dall.) 386, 390 (1798).

The U.S. Constitution prohibits subjecting any person to double jeopardy for the same offense. U.S. Const. Amend. V. As applied here, a violation of this clause has two requirements:

(1) A criminal statute.

(2) Imposing a multiple criminal punishment for the same offense.

Hudson v. United States, 522 U.S. 93, 118 S.Ct. 488 (1997).

In evaluating whether the statute is criminal or civil for purposes of *ex post facto* and double jeopardy analysis, the Court looks at the following factors:

(1) Did the legislative body indicate an intent to establish a civil penalty or a criminal penalty?

(2) If civil, was the statutory scheme so punitive either in purpose or effect that what was clearly intended as a civil remedy transformed into a criminal penalty. In making this

determination, one may consider but not be limited to certain guideposts.[5] *Id.* at 493 (1997), *adopting analysis in United States v. Ward,* 448 U.S. 242, 248-49 (1980) and *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 168-169 (1963).

The DFR law at issue violates the *Ex Post Facto* Clause of the Constitution because it involves the retroactive application of a penal statute against respondent, disadvantaging him by increasing the punishment for his crime. Similarly, the DFR law violates the Double Jeopardy Clause of the Constitution, as it is a criminal statute imposing a multiple criminal punishment on respondent for the same offense.

A. The DFR law contained in 10 U.S.C. §§ 1161(b) and 1167 has a retroactive effect against respondent.

Respondent was convicted on March 4, 1994. The Air Force Court of Criminal Appeals affirmed his conviction on November 20, 1995. On February 10, 1996, Congress enacted the DFR provision at issue in this case as part of the National Defense Authorization Act for Fiscal Year 1996,[6] Pub. L. No. 104-106, § 563, 110 Stat. 325. Respondent was

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[5] The *Kennedy-Ward* guideposts include (a) Whether the sanction involves an affirmative disability or restraint; (b) Whether it has historically been regarded as a punishment; (c) Whether it comes into play only on a finding of *scienter;* (d) Whether its operation will promote the traditional aims of punishment of retribution and deterrence; (e) Whether the behavior to which it applies is already a crime; (f) Whether an alternative purpose to which it may rationally be connected is assignable for it; and (g) Whether it appears excessive in relationship to the alternative purpose assigned to it.

[6] However, the amended § 116l(b) originally referred in its text to nonexistent § 1178, not to § 1167. The National Defense Authorization Act for Fiscal Year 1997 corrected the error. Pub. L. No. 104-201, § 1074(a)(5), 110 Stat. 2658. The technical amendment was enacted on September 23, 1996. 110 Stat. 2422.

notified of the DFR action on December 18, 1996. Pet. App. 25a. Thus, the DFR law had retroactive effect on respondent.

B. Congress intended its 1996 DFR provisions to be a penal and criminal penalty. This is revealed by an analysis of the history of DFR actions, the legislative history behind the 1996 change to the DFR law, and the statutory construction of the DFR law.

1. Contrary to Petitioners' assertion (Pet. Br. 28), a DFR action has not been historically remedial. Instead, it has been used to serve a military justice function.

DFR laws began in the 1870s. Both Article for the Government of the Navy 36 and Article of War 118 first permitted a DFR action for an unauthorized absence of at least three months. Congress later expanded DFR actions to cover confinement in a civil facility after a criminal conviction, first for the Army and then for the Navy. Act of Jan. 19, 1911, ch. 22, 36 Stat. 894; Rep. Nos. 209 and 309, 65th Cong., 2d Sess. (1918); Act of Apr. 2, 1918, ch. 39, 40 Stat. 501. These DFR laws survived in this form as a part of the military justice system for decades.

Congress overhauled the military justice system after World War II by enacting the Uniform Code of Military Justice (UCMJ), Pub. L. No. 81-506, 64 Stat. 106. When enacted in 1950, the UCMJ superseded the Articles of War and the Articles for the Government of the Navy. Section 1 of the law covered the 140 original articles of the UCMJ, including the punitive articles and procedural matters. *Id.* at 108-146. The remaining fourteen sections "related to" military justice. S. Rep. 486, 81st Cong., 2d Sess., *reported in* 1950 U.S. Code Cong. & Admin. News 2225. Section 10 adopted the criteria and language of the DFR laws previously found in Article of War 118 and Article for the Government of the Navy 36. Pub. L. No. 81-506, 64 Stat. 152.

The DFR law was subsequently codified in Chapter 22 of 50 U.S. Code §§ 551-741, entitled the "Uniform Code of Military Justice". Section 10 on DFR actions was codified at 50 U.S. Code § 739 in the subchapter XI, covering Miscellaneous Provisions of Chapter 22. Thus, as enacted in 1950, the law allowing DFR for extended unauthorized absences or extended confinement was in the Code chapter for the UCMJ. On January 1, 1957, the UCMJ was enacted into positive law and moved from Title 50 to Title 10 of the U.S. Code, with the DFR law moving to its present location at 10 U.S.C. § 1161(b).

It is inaccurate to claim that the National Defense Authorization Act for Fiscal Year 1996 labeled the DFR procedure as a "personnel" action.[7] The DFR law is codified in Chapter 59 of Title 10, entitled "Separation". 10 U.S.C. §§ 1161-1176. Chapter 59 covers all types of separations, including punitive discharges adjudged by courts-martial for officers in § 1161(a) and for enlisted personnel in § 1169(2). The DFR law is included at 10 U.S.C. § 1161, with its caption reading "Commissioned officers: limitations upon dismissal". "Dismissal" is a term of art. Dismissal of an officer is a punitive discharge; it is the officer equivalent of a dishonorable discharge for enlisted personnel. Rule for Courts-Martial (RCM) 1003(b)(9), Manual for Courts-Martial (MCM), United States, 1984. It is the most severe form of punishment imposable by a court-martial. *See generally Frazier v. McGowan,* 48 M.J. 828, 831 (C.G. Ct. Crim. App. 1998)(even the lesser type of punitive discharge (a bad conduct discharge) is more onerous than confinement). Merely placing a DFR statute within a "separation" chapter does not end the inquiry, as the *ex post facto* effect of a law

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[7] Both the UCMJ and DFR chapters fall within Title 10 U.S.C. Part II – Personnel.

cannot be evaded by disguising a criminal imposition as a civil action. *Burgess v. Salmon,* 97 U.S. 381, 385 (1878).

Petitioners have attempted to characterize the DFR law as a mere "personnel" action. It is not. A DFR action formally ends a commissioned officer's military status and, once accomplished, the officer is ineligible to reenter the Armed Forces. AFI 36-3207, para 4.1.1; *In Re Wilson,* 33 F.2d 214 (E.D.Va. 1929). Section 1161(b) on DFR actions serves a military justice function. As enacted, first in the Articles for the Government of the Navy and the Articles of War and then in the UCMJ, DFR actions were only used for criminal acts: an extended unauthorized absence in violation of Articles 85 (desertion), 86 (absence without leave), or 87 (missing movement), UCMJ, 10 U.S.C. §§ 885-87, or a criminal conviction in state or federal courts. Officers dropped from the rolls for absence without authority forfeit all pay. 37 U.S.C. § 803. Moreover, even prior to 1996, an officer dropped from the rolls left the service in a *dishonorable status.* W. Winthrop, *Military Law and Precedents,* 746 n. 99 (2d ed. 1920)(citing Circ. No. 4 (H.A.) 1891). Thus, a pre-1996 DFR action removed criminal officers who were generally beyond the reach of military control and served a military justice function. Act of Jan. 19, 1911, 36 Stat. 894; Rep. No. 966, 61st Cong., 2d Sess. (1911).

2. The year 1996 brought forth a radical change in the use and purpose of DFR actions when Congress amended 120 years of DFR law. The timing of this statutory change reveals Congress' intent to punish officers like respondent who had already been court-martialed, yet were still within military control and who were receiving pay while in confinement. This intent was divined by the court of appeals when it concluded that §§ 1161 and 1167 were punitive and that, as applied to respondent, they violated both *Ex Post Facto* and Double Jeopardy Clauses. Pet. App. 14a. The court of

appeals noted §§ 1161 and 1167 were "part of a package designed to deal with the same congressional concern that motivated passage of the 'punitive' Article 58b." *Id.* The new DFR law was viewed *in pari materia* with amended Article 57 and new Article 58b. Both were intended to be penal laws. The legislative history confirms this Congressional goal.

Amended Article 57 changed the effective date of that portion of a sentence that forfeited pay or allowances. Previously, forfeitures did not become effective until approved by action of the convening authority, the commander who convened the court-martial. Amended Article 57 made forfeitures effective on the earlier of the date that is l4 days after the date of the adjudged sentence or the date the convening authority takes action on the sentence. New Article 58b imposed total forfeitures of pay and allowances as a matter of law under certain circumstances. CAAF found new Article 58b violated the *Ex Post Facto* Clause when applied retroactively. *United States v. Gorski,* 47 M.J. 370 (1997).

While amending Article 57 and adding Article 58b to accomplish the stated goal of punishing future offenders through the forfeiture punishment provisions, Congress also changed the law to allow the dropping of officers from the rolls after their court-martial convictions were final. This insured that officer prisoners in confinement at the time of the legislation would be subject to identical punishments as those imposed by Article 58b on future offenders. CAAF noted this, stating, "termination of an officer's military status by dropping [him] from the rolls—a termination resulting from punitive action taken pursuant to the UCMJ—would have the same effect of terminating pay that is imposed by Article 58b." Pet. App. 14a.

CAAF made the proper conclusion from legislative history. The mixture of the two UCMJ articles and the new

DFR law began when Senator Barbara Boxer introduced S. 205 to amend Title 37, U.S. Code. § 804 to prohibit paying service members who were confined. Senator Boxer noted the legislation would save money and "treat military criminals as they deserve to be treated—as criminals—to be punished, not rewarded." 141 Cong. Rec. S.802 (Jan. 11, 1995).

The House of Representatives in June, 1995, worked the Boxer bill into its proposed legislation by requiring forfeiture of pay and allowances during any period of military confinement, with the amount forfeited being "the maximum percentage that the court-martial could have directed as part of the sentence." H. R. Rep. No. 131, 104th Cong., 1st Sess. 218 (1995).

The Senate modified the House proposal in July 1995 by having the automatic forfeitures apply to sentences which included confinement for one year or more. It also added a proposal to separate service members in long term military confinement, which it defined as one year or more. The Senate labeled these two proposals "Section 526. Forfeiture of pay and allowances and reduction in grade." and "Section 553. Separation in cases involving extended confinement." S. Rep. No. 112, 104th Cong., 1st Sess. 245-46 (1995). Most significantly, the Senate Report discussed all three provisions—amended Article 57, new Article 58, and the separation legislation—together. After discussing the forfeiture provisions, the Senate Committee on Armed Services noted:

> [I]n general, individuals sentenced to extended confinement are discharged from military service and lose their entitlement to military pay. There are some circumstances under current law, however, in which an individual can remain on active duty and continue to receive pay and allowances. The provisions recommended by the committee would make it clear that persons serving extended confinement should not receive pay or allowances and should not remain on active duty.

Id. at 246. The Senate thus affirmatively linked the three provisions into a common punitive purpose and with identical terms.

A Conference Committee resolved the variance in the House and Senate proposals in January 1996. The House amended the Senate bill by lowering the triggering sentence for automatic forfeitures under Article 58b from one year to six months. H. Conf. Rep. No. 450, 104th Cong., 1st Sess. 853 (1996), *reported in 1996 U.S. Code Cong. & Admin. News 379.* Simultaneously, the House reduced the minimum confinement time for separation from one year to six months, paralleling the provisions of Article 58b and enabling the statute to punish more officers. H. Conf. Rep. No. 450, 104th Cong., 1st Sess. 799-800 (1996), *reported in 1996 U.S. Code Cong. & Admin. News 325.* The Senate concurred in the House proposal to reduce the time periods. H. Conf. Rep. No. 450, 104th Cong., 1st Sess. 800, 853 (1996), *reported in 1996 U.S. Code Cong. & Admin. News 325, 378-79.*

The Conference Committee also proposed procedural legislation on how to implement its recommendation for "Separation in cases involving extended confinement." Specifically, it recommended the two changes to Chapter 59 of Title 10, by adding § 1167 to provide for the discharge of these members and by amending § 1161(b) to allow an officer meeting § 1167 criteria to be summarily dropped from the rolls of the armed forces. *Id.* at 146. One of the criteria for the separation and DFR proposals was that the member must actually have served at least six months in confinement. The Committee's recommendations were adopted verbatim by Congress in the National Defense Authorization Act for Fiscal Year 1996. Pub. L. 104-106, § 563, 110 Stat. 325.

In sum, Congress in 1996 passed Article 58b to punish future offenders by requiring automatic forfeiture of their pay while in confinement, regardless of their adjudged sentence. It simultaneously authorized the summary removal of an officer through a DFR action without the procedural rights afforded in separation actions.[8] Congress thus was able to use the DFR mechanism to punish officers who were outside the reach of Article 58b because they had already been court-martialed.

3. By its own terms, the new DFR law applies to respondent by reason of a sentence to confinement adjudged by a court-martial. The triggering mechanism is a court-martial conviction. A penalty conditioned upon commission of a crime is "significant of penal and prohibitory intent." *Dep't of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 781 (1994). Petitioners assert that administrative aspects of a DFR make it a civil action. Pet. Br. 26. The argument fails. The most common military justice action is the Article 15 nonjudicial punishment (hereinafter NJP). 10 U.S.C. § 815. Each NJP accuses the military offender of violating a UCMJ punitive article and then details a factual specification. Although administrative like a DFR action, NJP is clearly a military justice action. Indeed, the Commander-in-Chief describes an Article 15 as "more serious than an

[8] Chapter 60 of Title 10 already permits discharge for misconduct of an officer who is convicted by a court-martial and not sentenced to dismissal. 10 U.S.C. § 1181(b). Unlike the summary separation imposed by a DFR action, an officer separated under Chapter 60 has significant due process rights. 10 U.S.C. §§ 1182 (evidentiary hearing before a board of inquiry), § 1185 (notification, discovery). The Air Force initiated such an administrative discharge action against respondent in February 1998, but has delayed that action until this case is resolved. Pet. for Cert. 18, n.3. Petitioner seeks to dismiss the due process protections of an administrative discharge proceeding as "cumbersome, time-consuming, and resource-intensive". Pet. for Cert. 19.

administrative corrective measure." Manual for Courts-Martial, United States, 1984, Part V, ¶ 1b. A DFR action is the same. The revised DFR statute is triggered by a criminal act; it removes a military offender who is within military control; and it serves a criminal and penal purpose.

The DFR statute operates through 10 U.S.C. § 1167, which is entitled: "Members under confinement by sentence of court-martial: separation after six months confinement." The caption alone speaks of a penal or criminal purpose. The text of § 1167 details a penal purpose: separation after serving six months confinement if the sentence is final under Chapter 47. Chapter 47 is the Uniform Code of Military Justice, which consists of penal statutes or criminal laws. Section 1167 requires the sentence to be "final." This is a term of art under Article 76, UCMJ, 10 U.S.C. § 876. It basically means all reviewing authorities, including the appellate courts, have reviewed the sentence. Section 1167's repeated association with the UCMJ speaks of a penal purpose for the statute.

C. Assuming *arguendo* the new DFR law is construed as a civil statute, applying the *Kennedy-Ward* guideposts[9] shows the DFR statutory scheme transformed the statute into a criminal penalty, as its scheme is punitive in purpose or effect.

1. The DFR action results in affirmative restraint. Respondent loses his military status and pay but remains in military prison subject to the UCMJ. Loss of status and of pay while in military confinement has historically been a court-martial punishment. The new DFR law has the same effect on respondent—loss of military status and loss of pay and allowances—as the dismissal that the court-martial panel elected not to adjudge at his court-martial.

[9] See footnote 5, *supra*.

2. As drafted, the DFR law for a court-martial relies upon the underlying offenses, all of which required scienter. By relying upon the court-martial conviction, the new DFR statute incorporates the very scienter of respondent's court-martial.

3. The new DFR action promotes the traditional role of retribution and deterrence in the specialized military society. A higher standard of conduct is imposed on an officer by law, and the officer who fails that trust can be held to greater accountability. *United States v. Tedder,* 24 M.J. 176 (C.M.A. 1987); *United States v. Pitasi,* 20 U.S.C.M.A. 601, 44 C.M.R. 31 (1971). The DFR action deters respondent and other officers who are HIV positive from violating safe sex orders in the military, a unique military offense. The loss of military status and military pay serves as retribution for these military offenses. The DFR action against respondent promotes the same deterrence and retribution a dismissal would have had on respondent.

4. The DFR law relies on the behavior for which the military offender was convicted. Indeed, the wording of the law involves the same conviction, not just the same behavior. The DFR statute satisfies the "same elements" test in *Blockburger v. United States,* 284 U.S. 299 (1932).

5. There is no rational alternative purpose assignable to the DFR action that seeks to drop respondent from the rolls of the Air Force. Unlike petitioners' claim (Pet. Br. 29), a DFR action is not needed to promote efficiency in the armed forces or to separate a member who is no longer performing military duties. This flawed logic is apparent when one considers that the legislation does not permit the military to institute a DFR action until the officer has *served* at least six months confinement, even if the conviction is already final.

Military efficiency can be promoted by dropping a service member from *unit rolls,* an action affecting manning

strength only without terminating military status. AFI 36-3207, paragraph 4.1.2. Service members who are absent without authority or who are in civilian confinement are no longer under military control. They can be dropped from unit rolls, thus affecting Air Force strength figures without ending a member's military status. However, dropping an officer from the rolls of the Air Force ends a member's military status. Its sole purpose is to impose the same punishment result that a court-martial sentence of dismissal would achieve, even though the offender is within military control.

6. Further, the new DFR statute is excessive in relationship to its purpose. Court-martialed officers sentenced to confinement but no dismissal can be and usually are administratively separated with the due process protections of a board of inquiry under 10 U.S.C. §§ 1181(b), 1182, and 1185. A board of inquiry achieves the same result of separating an officer from active duty, although the board could recommend retention of the officer. Moreover, a recommendation to retain an officer cannot be disregarded by higher authority. AFI 36-3206, paragraph 7.34.5. The DFR action rids the service of an officer offender within military control through summary drumhead justice rather than through the protections of a court-martial or an administrative discharge board. It is overkill without safeguards.

The presence of *Kennedy-Ward* guideposts reveal the statutory scheme was punitive in purpose and effect. Thus, the statute is transformed into a criminal penalty in violation of the Double Jeopardy Clause.

D. The new DFR law disadvantages respondent and increases punishment for his offenses.

1. Respondent changed his status from civilian to military upon being commissioned as an officer. He received base pay and such allowances as basic allowance for

subsistence and basic allowance for quarters. He became subject to the UCMJ and could be convicted by a court-martial for violating the UCMJ. The UCMJ sets mandatory maximum sentences such as death or life in prison for certain offenses. However, the President has authority under Article 56, UCMJ, 10 U.S.C. § 856, to set maximum limits on punishment for most other offenses. Unlike offenders in state or federal systems of criminal justice, a military offender can be sentenced to forfeit his pay, lose status as a service member, and be removed from the military with a stigma. A court-martial can separate an accused only with a punitive discharge, not with an administrative discharge. *United States v. Phipps,* 12 U.S.C.M.A. 14, 30 C.M.R. 14 (1960)(opinion mentions undesirable discharges, which are now called "Under Other Than Honorable Conditions" discharges).

2. Respondent was convicted and sentenced to six years confinement and forfeiture of $2,500 of his base pay each month for 72 months (a total of $180,000). Significantly, the court-martial panel did **not** sentence him to a dismissal. Had the punishment included a dismissal, the Secretary of the Air Force could order execution of the dismissal after his appeals ended. Once executed, a dismissal ends military status, resulting in loss of all pay and allowances. A prisoner losing military status remains in prison subject to court-martial jurisdiction under Article 2(a)(7), UCMJ, 10 U.S.C. § 802(a)(7). The practical effect of his sentence was that respondent remained on active duty drawing a portion of his base pay and his allowances. Upon retirement, he also might have received benefits from the Veterans Affairs Department, including VA medical care for his HIV infection that was incurred incident to active duty. Knowing such effects, the court-martial panel (jury) did not impose a dismissal, choosing instead to impose 6 years confinement (out of a maximum of 10 years) and forfeiture of $2,500 pay per month

for 72 months. The Air Force cannot now disregard the judgment of the panel's calculation of an appropriate sentence, which affirmatively avoided the deleterious effects of a dismissal upon the respondent. *See Lynce v. Mathis,* 519 U.S. 433, 445-446 (1997)(citing *Weaver v. Graham,* 450 U.S. 24, 32 (1981)).

3. The proposed DFR action would increase respondent's punishment. His pay situation would go from forfeiture of part of his pay to loss of **all** pay and allowances. He would go from active duty status to civilian status while still subject to court-martial jurisdiction for the remainder of his confinement. He also would suffer the stigma of separation with ignominy inherent with being dropped from the rolls. The DFR action would also cost him VA medical care, which was needed to treat his HIV infection should he leave military service, in addition to numerous other federal, state, and local benefits.

4. Petitioner notes that Congress can impose civil and criminal sanctions for the same conduct. Pet. Br. 30. While this is true, respondent's situation differs from the cases cited by petitioners. *United States v. Ursery,* 518 U.S. 267 (1996) involved *in rem* civil forfeitures. Such forfeitures are not involved in respondent's case. His situation also is easily distinguishable from *Hudson v. United States,* 522 U.S. 93 (1997) and occupational debarment cases.

Criminal courts in *Hudson* and cases involving debarment in occupations, such as a doctor or a lawyer, do not impose an occupation debarment as part of the criminal sentence. Criminal courts also do not take away the offender's government pay as part of the criminal sentence. Another proceeding can impose those sanctions. In contrast with civilian criminal courts, however, a general court-martial can sentence an officer offender to loss of military status and forfeiture of all or part of military pay. In respondent's case,

the DFR action imposes the loss of active duty status and forfeiture of total pay that respondent avoided as a permissible punishment in his case. Forfeiture of military pay is not equivalent to the monetary sanction imposed in *Hudson.* Under RCM 1003(b)(2) & (3), a general court-martial may impose either a forfeiture of pay or a fine, or both, as a criminal punishment. Forfeiture involves military pay the service member gets each month. Fine involves monies from the offender's own pocket. The monetary sanction in *Hudson* is equivalent to a military fine. The DFR action is not imposing a different sanction; it is imposing the very financial punishment respondent avoided as his sentence.

5. DFR action based on a court-martial conviction smacks of a violation of RCM 1107(d)(1), which prohibits a convening or higher authority from increasing the punishment imposed by a court-martial. If upset that the sentence lacks a punitive discharge, the convening or higher authority can nullify the verdict by initiating a DFR action despite the judgment of the court-martial panel. The senior official can use the DFR statute to get the same result as the court-martial, add a stigma to the separation like a punitive discharge, and increase the punishment. This is similar to the type of abuse feared in *Unger,* 27 M.J. at 354 and nn. 10-11, 355. There, Chief Judge Everett expressed concern about bypassing the protections of a court-martial where no punitive discharge was either adjudged or approved. Similar concerns were voiced 39 years earlier in *Phipps,* 12 U.S.C.M.A. at 16, 30 C.M.R. at 15-16 (Quinn, C.J., concurring). Even three of the members of CAAF who found jurisdiction under the All Writs Act to consider *Goldsmith* found the DFR action increased respondent's punishment.

6. Petitioners assert no stigma attaches to a DFR action. In reality, a DFR action is a badge of dishonor and is a punishment. The Executive Branch, acting through the

Veterans Affairs Department, promulgated a VA regulation concerning benefits related to separations. 38 C.F.R. § 3.12(d) precludes VA benefits when the separation is based on "one of the offenses specified in this paragraph is considered to have been issued under *dishonorable* conditions: ... (3) An offense involving moral turpitude. This includes, generally, conviction of a felony." A DFR action based upon a court-martial for offenses involving moral turpitude is certainly a separation under dishonorable conditions.

Petitioners assert *Helmich v. Nibert,* 543 F. Supp. 725 (D. Md. 1982) proves that no stigma attaches to a DFR action. Pet. Br. 33. *Helmich,* which involved a *pro se* litigant without legal knowledge, relied on an Army regulation covering separation actions. However, the *Helmich* court failed to consider the impact of the VA regulation. The court there acknowledged that a liberty interest within the Fifth Amendment's Due Process Clause would be at hand when the military separated a member under conditions that stigmatize that member, "typically by *dishonorable* discharge." *Helmich* at 727 (emphasis added). The VA regulation provides the dishonorable stigma to the DFR action. The DFR action costs respondent more than just his active duty status. It also stigmatizes him with a loss of his status as a commissioned officer.

To say that a DFR action carries no stigma belies common sense and fails to account for the tremendous importance placed upon an honorable service characterization for those serving in our nation's armed forces. The profound impact wrought by a less than honorable service discharge is most often seen in the realm of administrative discharges. Since the vast majority of military members receive honorable discharges, any service characterization not fully honorable brands the member with wide-ranging deleterious effects. See

Everett, *Military Administrative Discharges—The Pendulum Swings,* 1966 Duke L.J. 41 (1966).

Recognizing that less than honorable discharges had nearly as severe an impact on a member's life, Congress became increasingly concerned in the early 1960s with the concerted effort of the Armed Forces to bypass the constitutional protections embodied within the UCMJ by discharging members from the service via administrative discharges vice courts-martial proceedings. *Id.* at 49, 53. Though some reforms were made, the judicial branch of the federal government repeatedly recognized the stigma associated with such discharges. See *Kauffman v. Secretary of the Air Force,* 415 F.2d 991, 995 (D.C. Cir. 1969); *Van Bourg v. Nitze,* 388 F.2d 557, 559 n.1 (D.C. Cir. 1967); *Bland v. Connally,* 293 F.2d 852, 853 n.1 (D.C. Cir. 1961).

Prospective employers often refuse to hire members with less than honorable discharges.[10] A review of federal, state, and local benefit programs reveals the life-long burden placed on members with less than honorable discharges. For example, Department of Veterans Affairs benefits are given only to service members who meet the definition of "veteran": namely, "a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable." 38 U.S.C. § 101(2).[11] The Armed Forces likewise condition benefits

[10] Jones, *The Gravity of Administrative Discharges: A Legal and Empirical Evaluation,* 59 Mil. L.R. 1, 18 (1973) (study revealed significant use of the discharge certificate to qualify for employment and benefits.)

[11] VA benefits include dependency and indemnity, Servicemembers' Group Life Insurance, educational assistance, home and other loans, and funeral and burial expenses. *Id.* at 11.

upon service characterization.[12] Also, numerous federal agencies follow suit, as a service member's reemployment rights and veterans federal civil service preferences are adversely affected. Jones, *The Gravity of Administrative Discharges: A Legal and Empirical Evaluation,* 59 Mil. L.R. 1, 12 (1973). State agencies have similar restrictions, as they typically condition benefits upon receipt of an honorable discharge.[13]

While the widespread stigma associated with a less than honorable discharge is commonly recognized, the negative import of a DFR action is largely overlooked. Petitioners assert that a DFR action carries no stigma because no service characterization is issued by the military. Pet. Br. 32. Though it is true that a member who is dropped from the rolls is not given a service characterization, it is certainly not true that the failure to provide a discharge certificate (Department of Defense Form 214, hereinafter DD Form 214) produces no stigma. Such a failure to issue a DD Form 214 causes profound and pernicious effects to the military member and his or her dependents. The data contained on the DD Form 214 not only summarizes the member's service record, it is also used extensively by federal and state agencies, prospective employers, and professional licensing boards.[14] If the respondent is dropped from the rolls of the Air Force, he will not receive a DD Form 214. AFI 36-3202, Table 2, Rule 8 (20 May 1994). Thus, his entire period of military service

[12] Benefits include payment for accrued leave (37 U.S.C. § 501), transportation of dependents and household goods, and burial in a national cemetery. *Id.* at 12.

[13] E.g. Tex. Gov't Code § 657.002 (1998)(must be honorably discharged to qualify for veteran's employment preference).

[14] General Accounting Office, *Need For and Uses of Data Recorded on DD Form 214 Report of Separation Form Active Duty* (Jan. 23, 1975) (FPCD-75-126).

as an officer, stemming back almost 20 years, will simply evaporate. Prospective employers typically refuse to hire a service member unless they produce a DD Form 214.[15] The lack of a DD Form 214 would also hamper respondent's ability to convert his Servicemembers' Group Life Insurance policy to a commercial policy as insurance companies typically examine the DD Form 214 to verify that the conversion occurs within 120 days of release from active duty.[16] In addition to the hindrances caused by a lack of a DD Form 214, a DFR'd member will not receive payment for accrued leave, akin to those discharged under less than honorable conditions. 1990 U.S. Comp. Gen. 668 (1990). The importance of receiving a DD Form 214 is vividly demonstrated by its wide-spread uses in civilian life. In sum, a DFR action will stigmatize the service member in a manner akin to a dismissal adjudged by a court-martial, though the service member does not receive any service characterization.

Not only does the DFR statute disadvantage the officer by stigmatizing the member, it also imposes a change in status from service member to civilian for a specific court-martial sentence. In *Trop v. Dulles,* 356 U.S. 86 (1958)(plurality), this Honorable Court struck down a law that changed a service member's status from citizen to expatriate for a specific court-martial sentence. In 1940, Congress amended this Civil War-era law to cause a soldier to lose his citizenship for a

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[15] Jones, *supra,* note 10 at 16. More than 50% of prospective employers required veterans to produce the DD Form 214 as a part of the employment application process. Many employers would disqualify a veteran from further consideration if the form was not produced. Further, the veteran faces stigmatizing consequences not commonly incurred by civilian employment applicants since the DD Form 214 releases far more information than civilian employers would provide about their former employees. *Id.* at 17.

[16] *Id.* at 19.

court-martial conviction for wartime desertion. In 1944, Congress again amended the statute to limit the change in status from citizen to expatriate to a wartime deserter whose court-martial sentenced him to dismissal or a dishonorable discharge. After passage of that law, Trop deserted his unit in North Africa, and a court-martial sentenced Trop to three years confinement, total forfeitures, and a dishonorable discharge. His 1952 application for a passport was denied because he had lost his citizenship under the 1944 law. In 1955, Trop sought declaratory judgment that he was a United States citizen.

Using the *Calder v. Bull* analysis, a plurality of this Honorable Court concluded that this statute changing the citizenship status of a soldier sentenced by a court-martial to a dishonorable discharge for wartime desertion was a penal statute. The Court rejected Government claims that the statute "technically is not a penal law." *Trop* at 94. This Honorable Court held that the fundamental nature of the statute was penal.

The DFR action disadvantages respondent and increases respondent's sentence by taking action akin to the dismissal avoided at trial and by causing the total forfeiture of his pay and allowances. Additionally, the DFR action stigmatizes respondent with life-long deleterious effects. The court-martial panel (jury) decided against inflicting such punishments despite the opportunity to do so, choosing instead to sentence respondent to 6 years confinement and forfeiture of $2,500 pay for 72 months. The Air Force cannot now render this judgment infirm.

E. The Air Force lacks the regulatory authority to DFR respondent.

The Air Force does not possess the regulatory authority to apply the DFR action to respondent. 10 U.S.C. § 1161

permits DFR actions in cases of officers who may be separated under Section 1167. Section 1167 authorizes the separation of members sentenced by a court-martial to certain sentences "[e]xcept as otherwise provided in regulations prescribed by the Secretary of Defense". The letter initiating DFR action against respondent cited Section 563 of the National Defense Authorization Act for Fiscal Year 1996 and AFI 36-3207, paragraph 4.2.3. as authority for the Air Force's action. Pet. App. 25a. However, at the time of the DFR initiation in November 1996 (and through the writing of this brief), the Air Force instruction only permitted DFR actions for officers convicted by civil authorities and confined in federal or state facilities, not officers in confinement under a sentence of a court-martial. AFI 36-3207, 4.3.1. By failing to include a DFR action for an officer convicted by a court-martial in its instruction, the Air Force, as a matter of policy has promulgated a more protective regulation, as permitted by § 1167. Thus, the Air Force initiated this action without having any implementing Departmental instructions.

Further, § 1161(b) permits only the President to DFR an officer. Congress permits a President to delegate a statutory duty, 3 U.S.C. § 301, but no President has issued an executive order to delegate DFR actions. II U.S.C.A. Table 3 Executive Orders (1998). (Presidential delegation authority under Article 140, UCMJ, 10 U.S.C. § 940, only applies to Chapter 47 of Title 10). AFI 36-3207, paragraph 4.2. purports to let the Secretary of the Air Force drop officers from the rolls.

Not only is a regulatory basis lacking, the proposed DFR action conflicts with Article 56, UCMJ, 10 U.S.C. § 856. Article 56 lets the President prescribe the sentence courts-martial may impose. Under that authority and RCM 1003(b), the President set the maximum punishment for respondent's offenses at 10 years confinement, dismissal from the service, up to total forfeiture of pay and allowances and a fine. The

court-martial panel chose not to adjudge a dismissal and it set forfeitures at $2,500 pay/month for 72 months. The DFR action now has the President taking an action that, in this case, converts this partial forfeiture of base pay to total forfeiture of pay and allowances and retention of military status to a separation with ignominy.

In sum, Respondent's court-martial could have sentenced him to a loss of military status via a dismissal. It did not. The new DFR statute exacts the same loss of military status under a different name. By increasing respondent's punishment as a direct incident of his court-martial conviction, the new DFR law disadvantaged respondent by increasing his punishment. The DFR law at issue violates the *Ex Post Facto* Clause of the Constitution because it involves the retroactive application of a penal statute against respondent, disadvantaging him by increasing the punishment for his crime. Similarly, the DFR law violates the Double Jeopardy Clause of the Constitution, as it is a criminal statute imposing a multiple criminal punishment on respondent for the same offense. Finally, the Air Force lacks the regulatory authority to DFR respondent.

The opinion and order of the Court of Appeals for the Armed Forces must stand. The court of appeals properly exercised its jurisdiction under the All Writs Act to prohibit the application of statutes that violated the *Ex Post Facto* and Double Jeopardy Clauses of the Constitution of the United States.

CONCLUSION

The decision of the United States Court of Appeals for the Armed Forces should be affirmed.

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